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Supreme Court of the United States

October Term, 1977
Nos. 76-1471, 76-1521, 76-1595, 76-1604,
76-1624, 76-1685

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

vs.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief of Respondent National Citizens Committee for Broadcasting.

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NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Brief of Respondent National Citizens Committee for Broadcasting.

OPINIONS BELOW.

The opinions of the Court of Appeals are reported at 555 F.2d 938 (D.C. Cir. 1977) (A. 339-444).[1] The opinions of the Federal Communications Commission (FCC) are reported at 50 F.C.C.2d 1046,[2] *reconsideration*, 53 F.C.C.2d 589 (1975) (A. 134-338).

[1] *National Citizens Committee for Broadcasting v. FCC* (hereafter, *NCCB*).

[2] Second Report and Order, *Multiple Ownership* (hereafter *Second Report*).

JURISDICTION.

This Court has jurisdiction under 28 U.S.C. §1254 (1), the Court having granted and consolidated the various petitions for a writ of certiorari in this review on October 3, 1977.

STATUTES INVOLVED.

Sections 2(a), 4(i), 4(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a) and 309(d) of the Communications Act of 1934, 48 Stat. 1064, *as amended,* 47 U.S.C. §§152(a), 154(i), 154(j), 301, 303(g), 303(r), 307(a), 307(d), 309(a) and 309(d) (1970) are set forth in the Appendix. (A. 27-32).

In addition, Respondent sets forth Section 1071 of the Internal Revenue Code, 26 U.S.C. §1071, in the Appendix to this brief.

QUESTIONS PRESENTED.

Whether the Federal Communications Commission has the authority to adopt a general rule proscribing future licensing of broadcast stations to daily newspapers serving the same market.

Whether the Court of Appeals was correct in holding that the Commission acted arbitrarily and capriciously when it grandfathered most existing broadcast station-newspaper combinations.

Whether the Court of Appeals correctly concluded that the Commission acted arbitrarily in differentiating among licensees in setting the standard for divestiture of cross-owned media.

Whether the Court of Appeals acted reasonably when it ordered the Commission to take further steps to

ensure that everyone would be consistently treated under the general standard against cross-ownership adopted in the rulemaking proceeding.

COUNTERSTATEMENT OF THE CASE.

These cases present for review a decision of the United States Court of Appeals for the District of Columbia Circuit upholding that portion of the Federal Communications Commission's multiple ownership rules (47 C.F.R. §§73.35, 73.240 and 73.636 (1976)) that prohibit ownership between co-located broadcast stations and newspapers, and vacating that part of the rules which grandfathers all but 16 current licensees that are associated with co-located newspapers. The respondent, National Citizens Committee for Broadcasting, seeks affirmance.

A. The FCC's Long-Standing Emphasis on Diversification of Ownership of the Media of Mass Communication.

The Federal Communications Commission, with the guidance of this Court[3] and the courts of appeals,[4] has long recognized that in a licensing scheme where access by the public is necessarily limited, diversification of ownership of the media of mass communication

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[3] *E.g., United States v. Storer Broadcasting Co.,* 351 U.S. 192, 203-04 (1956); *Associated Press v. United States,* 326 U.S. 1, 20 (1945). *See also CBS v. Democratic National Committee,* 412 U.S. 94, 122 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969).

[4] *E.g., General Telephone Co. of the Southwest v. United States,* 449 F.2d 846, 857 (5th Cir. 1971); *Citizens Communications Center v. FCC,* 447 F.2d 1201, 1207, 1213-14, n. 36 (D.C. Cir. 1971); *Clarksburg Publishing Co. v. FCC,* 225 F.2d 511, 518-19 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc. v. FCC,* 189 F.2d 677, 683 (D.C. Cir.), *cert. denied* 342 U.S. 830 (1951).

is a strong, if not primary licensing factor.[5] Thus the Commission adopted rules (1) in 1941 requiring NBC to divest one of its dual networks[6]; (2) in 1941-43 barring common ownership of two local broadcast stations of the same type (*e.g.*, only one AM radio license in a given market) and requiring divestiture within six months to conform to the new "duopoly" standard[7]; and (3) in 1953 specifying maximum numbers of TV, AM and FM stations allowed to be under common ownership nationally.[8]

As early as 1944 the Commission considered newspaper ownership to be a relevant factor in awarding licenses. Although it declined to adopt a rule generally barring newspaper ownership of a local station, the Commission stated its intention at that time not to grant licenses "to permit concentration of control in

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[5]*E.g., Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 394 (1965) (hereafter, *1965 Policy Statement*). See also cases cited in the Court's decision below, *NCCB*, 555 F.2d at 948-49, nn. 26-27 (A. 336-68).

[6]*Report on Chain Broadcasting,* Docket 5060, May 1941, *affirmed, National Broadcasting Corp. v. United States,* 319 U.S. 190 (1943).

[7]*Duopoly Rules* 5 Fed. Reg. 2382 (1940), 6 Fed. Reg. 2282 (1941), 8 Fed. Reg. 16065 (1943). *See* 1945 F.C.C. Annual Report, at 12.

[8]*Amendment of the Multiple Ownership Rules,* 18 Fed. Reg. 7796 (1953), *affirmed United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956). Unlike the instant case, almost all licensees met this standard at the time it was adopted. Divestitures were thus considered on a case-by-base basis. *Amendment of Multiple Ownership Rules,* 9 P&F Radio Reg. 1563, 1572 (1953). According to one commentator, only two parties violated the new rule. They were each given three years to divest their excess stations. H. Howard, *Multiple Broadcast Ownership: Regulatory History,* 27 *FED. COM. B.J.* 1, 15 (1974).

the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."[9]

When adopting ownership diversification rules, the Commission has regularly imposed divestiture remedies to achieve its policies.[10] Congress has not only specifically approved this practice but also fostered it. In reaction to the Commission's divestiture requirements in its 1943 AM duopoly rules, *supra*, n. 7, Congress amended the Internal Revenue Code in 1944 to authorize the FCC to grant special tax certificates. This allowed licensees who sold or exchanged their media properties in order to effectuate a change in a Commission ownership policy, to defer capital gains by treating the transactions as involuntary conversions.[11]

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[9]*Newspaper Ownership of Radio Stations,* 9 Fed. Reg. 702 (1944).

[10]In addition to the divestiture orders listed above, the Commission has required, for example, divestiture of syndication companies by networks, *see Iacopi v. FCC,* 451 F.2d 1142, 1147 (9th Cir. 1971); divestiture of cable television systems by telephone companies, *General Telephone Co. of the Southwest v. United States, supra,* n. 4; divestiture of cable television systems by television networks and by television licensees in the same market, *CATV,* Second Report and Order, 23 F.C.C.2d 816 (1970); 47 C.F.R. §76.501 (1975). *But see Cable Television Systems,* Second Report and Order, 55 F.C.C.2d 540 (1975), *appeal pending sub nom. National Citizens Committee for Broadcasting v. FCC,* D.C. Cir. No. 75-1933 (Sept. 22, 1975) (Amendment of divestiture requirement to conform to standards established in Docket 18110; case being held in abeyance pending this review). Also, the Commission has required divestiture by the networks of spot sales representation for their affiliates, *Metropolitan Television Corp. v. FCC,* 289 F.2d 874 (D.C. Cir. 1961).

[11]Revenue Act of 1943, §123, 58 Stat. 44 (Feb. 25, 1944), 26 U.S.C. §112(m); now 26 U.S.C. §1071. *See* H. Rep. No. 1079, 78th Cong., 2d Sess. (1944) at p. 50.

Subsequently, in the broadcast license renewal context, the Commission began in the 1960s to recognize that the diversification factor, even without proven abuses, may warrant loss[12] or divestiture[13] of license.

Seeking to consider the diversification issue on an industry-wide basis, however, the Commission in 1968 instituted a new rulemaking proceeding, Docket 18110, to revisit the question of local concentrations of control. *Multiple Ownership,* Notice, 33 Fed. Reg. 5315 (1968). In 1970, again "to promote maximum diversification of programming sources and viewpoints," *id.*, the Commission barred future creation or transfer of TV-radio (AM/FM) combinations. *Multiple Ownership,* First Report and Order, Docket 18110, 22 F.C.C. 2d 306 (1970) (A. 33) (hereafter, *First Report*). The Commission held to the view that "60 different licensees are more desirable than 50, and even that 51 are more desirable than 50." *Id.*, 22 F.C.C.2d at 311, ¶ 21. (A. 43).

B. The 1970 Proceeding, Docket 18110.

1. The Further Notice of Proposed Rulemaking.

Concurrently with its *First Report,* the Commission issued a Further Notice of Proposed Rulemaking, *Multiple Ownership,* Docket 18110, 22 F.C.C.2d 339

[12]*WHDH, Inc.*, 16 F.C.C.2d 1 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971) (TV license granted to competing applicant but case "sui generis" because renewal applicant had only a four month license). *See also Midwest Radio-Television, Inc.*, 16 F.C.C.2d 943, 18 F.C.C.2d 1011 (1969) (media concentration issue designated for hearing apart from questions of abuse), *deferred,* 24 F.C.C.2d 625 (1970).

[13]*Frontier Boradcasting Co.*, 21 F.C.C.2d 570 (1970), *dismissed for voluntary divestiture,* 35 F.C.C.2d 875 (1972).

(1970) (A. 101), proposing to require divestiture within five years of all existing newspaper-broadcast or television-radio combinations in a single market. Future creation or transfer of newspaper-broadcast combinations would also be barred, for, the Commission found, "[i]t has now become clear that the most significant aspect of the problem is the common control of television stations and newspapers of general circulation. . . . [T]he public looks primarily to these two sources for its news and information on public affairs." *Id.*, 22 F.C.C.2d at 344, ¶ 26 (A. 111).

As then Chairman Dean Burch described the matter in his concurring opinion:

> There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities, and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then is the guts of the matter. *Id.*, 22 F.C.C.2d at 350 (A. 124).

During the next five years, while the Commission considered the concentration question by rulemaking, it deferred specific license challenges based on undue concentration of control grounds to this proceeding.[14]

[14]*See, e.g., Columbus Broadcasting Coalition v. FCC,* 505 F.2d 320, 325 (D.C. Cir. 1974); *Stone v. FCC,* 466 F.2d 316, 331 (D.C. Cir. 1972); *Hale v. FCC,* 425 F.2d 556 (D.C. Cir. 1970); *Scripps-Howard Broadcasting Company,* 31 F.C.C.2d 1090 (1971); *Federation of Citizens Ass'ns (D.C.),* 21 F.C.C.2d 12 (1969). In *Hale, supra,* Judge Tamm concurred to note that Docket 18110 offered "some hope that the Commission will finally come to grips with the grave problem inherent in the rising concentration of ownership in the mass media. . . ." *Id.*, 425 F.2d at 566.

Indeed, the Commission even deferred such questions in ongoing adjudicatory hearings to this rulemaking.[15]

2. The Second Report and Order.

Finally, in 1975, after extensive rulemaking proceedings, and spurred by Congress and the courts,[16] the Commission issued its *Second Report, Multiple Ownership*, 50 F.C.C.2d 1046 (1975) (A. 134). The Commission prohibited the creation of future television-newspaper combinations in the same community. Even though it found the record inconclusive on the question of whether actual abuses stemmed from broadcast-newspaper cross-ownership, the Commission acted to increase the diversity of media voices.

The Commission also determined that divestiture was an appropriate remedy to implement its new standard, but applied it in only 16 of the nation's smallest markets, where one entity controlled an absolute monopoly over the local daily newspapers and broadcast stations. *Second Report*, 50 F.C.C.2d at 1081-82, ¶ 114, 1098 (A. 204-06, 242).

As long as the community had one other signal, however, the Commission grandfathered the existing media cross-owner from future license challenge. Renewal hearings on undue concentration of control issues

[15]*E.g., Chronicle Broadcasting Co.*, 40 F.C.C.2d 775, 796 (1973); *Midwest Radio-Television, Inc.*, 24 F.C.C.2d 625, 627 (1970).

[16]*See, e.g.*, H.R. 12993, 93d Cong., 2d Sess., March 28, 1974 (requiring FCC to resolve Docket 18110 within six months), H. Rep. No. 93-961, 93d Cong., 2d Sess. (hereafter, *House Report*) at p. 23; S. Rep. No. 93-1190, 93d Cong., 2d Sess. (hereafter *Senate Report*) at pp. 14-15, 22 (action required on Docket 18110 by end of calendar year); *Columbus Broadcasting Coalition v. FCC, supra*, n. 14, 505 F.2d at 330.

would thereafter be foreclosed unless economic monopolization under the Sherman Antitrust Act could be demonstrated. *Id.*, 50 F.C.C.2d at 1088 (A. 218).[17] With respect to divestiture, the Commission claimed that "local ownership," "continuity of operations," and "local economic dislocations" outweighed the suddenly "abstract," and "mere hoped for gain in diversity." *Second Report*, 50 F.C.C.2d at 1078 (A. 196-98).

The Commission noted, in addition, that all licensees who divested to meet the new standard, whether required to divest or not, would receive beneficial tax certificates under 26 U.S.C. §1071. *Id.*, 50 F.C.C.2d at 1085, n. 45 (A. 211).[18]

[17]Subsequent cases have shown that the Commission has not followed this extremely difficult standard. *E.g., WGAL-Television, Inc.*, 62 F.C.C.2d 527 (1976) (FCC refused to designate issue on economic monopolization since it had neither the expertise nor experience to enforce the antitrust laws). *See* decision below, *NCCB*, 555 F.2d at 966, n. 108 (A. 428-29).

[18]Of the seven Commissioners, six either concurred or dissented. Commissioners Lee, Reid, and Washburn concurred; Commissioners Hooks and Robinson concurred in part and dissented in part; and Commissioner Quello issued a separate statement which he did not characterize.

Commissioner Quello objected to the Commission's failure to adopt policies or rules requiring operational separation of commonly owned newspaper-broadcast combinations, and urged "extreme vigilance on a case-by-case basis." (A. 277). Commissioner Hooks joined him on this point, and also dissented in part because: "I cannot join my colleagues in limiting divestiture to pure monopoly instances while ignoring other circumstances where the problem could be as bad or worse." (A. 273).

Commissioner Robinson filed a comprehensive opinion arguing for a structural rather than a behavioral approach to concentration. He noted that the decisional standard of proof used by the Commission in evaluating the record reversed the traditional assumption "that a competitive, unconcentrated ownership structure is prima facie in the public interest" (A. 295). This, he argued, in essence approves "how some broadcasters regard their licenses as property," a view "simply at odds with our statute." (A. 296, n. 20).

3. Reconsideration.

On reconsideration, *Multiple Ownership*, 53 F.C.C. 2d 589 (1975) (A. 317) (hereafter, *Reconsideration*), the Commission rebuffed industry pleas to adopt no rules in this field and reiterated its belief in the guiding premise of the rule. It noted: "[W]e again must reject [the] argument that commonly owned media provide diversity. It is unrealistic to expect the same level of diversity as would be offered if the entities were under separate ownership." *Id.*, 53 F.C.C.2d at 592, n. 9 (A. 323).

But the Commission maintained diversity is primary only "when it can be achieved without hardship or disruption." *Id.* at 592, ¶ 8 (A. 324). For instance, the Commission stated that if any new "egregious situations" or effective monopolies should arise due to the loss of currently existing competitive services, those stations would not have to divest. *Id.*, 53 F.C.C.2d at 590-91 (A. 320).

C. The Court of Appeals Decision.

Upon appeals brought by NCCB, several licensees facing divestiture, the National Association of Broadcasters, and the American Newspaper Publishers Association, the Court of Appeals unanimously reversed the Commission (A. 339). It upheld the Commission's assertion of authority to act to increase diversity prospectively even though the Commission had found no established record of actual abuses flowing from cross-ownership. But the Court reversed the Commission's decision that such a record is necessary before divestiture of existing cross-ownerships could be ordered (A. 415-31). The Court examined the reasons put

forth by the Commission for this inconsistent position, and found them, upon thorough analysis of the record, to be invalid and unsupported by the record. As it later summarized:

> [W]e were faced with a situation in which the Commission had treated three indistinguishable groups very differently. Because of this, steps had to be taken to restore consistent administrative treatment. Since the only consistent and court-approved policy in this field was that which we approved in affirming the Commission's prospective rules, and because no valid reasons had been given by the Commission for departing from this policy of giving diversity of media ownership controlling weight, we ordered the Commission to take further steps to ensure that everyone would be consistently treated under the standard already adopted for new license applicants (subject, of course, to an appropriate waiver procedure, which we also ordered the Commission to adopt, but which it had already indicated would be available with respect to the egregious 16). *NCCB*, 555 F.2d 967, 969-70 (A. 443).

The Court supported the above conclusion with the following analysis:

(1) The Commission had the authority to promulgate prospective rules prohibiting cross-ownership even though the record was inconclusive on the question of whether actual "abuses" flowed from newspaper-broadcast ownership. Its authority flows from long-established principles which indicate that the Commission could act to increase diversity of broadcast media. The Commission's action based on diversity is supported by the fact that the Commission had consistently

acted on diversity principles with the repeated support of the Supreme Court and the courts of appeals (A. 362-88).

(2) But contrary to these established principles favoring diversity, the Commission when it considered divestiture of presently co-located facilities insisted on the need for actual evidence of abuses. And while the Commission made reference to differentiating factors between present and future licensees, the Court found that the Commission had either no record support for them or the Commission had weighed them in a manner inconsistent with past practice. First, in this regard, the Court reviewed the Commission's consideration of harm to the public interest that might result from the reduction of the quality of broadcast programming if divestiture were ordered. Here the Court found that the Commission had found no basis in the record to support such a proposition. Next, the Court examined the competing policies that the Commission had asserted to support its shift of emphasis. These the Court found had in all instances in the past been given lesser weight than diversity. Moreover, the Court found that to weigh these new policies in the way the Commission had, would require "massive shifts" in Commission practice with respect to license transfers (A. 394-430).

(3) Finally, the Court held that there was no record evidence that justified the disparate treatment of the 16 "egregious" cases that were ordered to divest by the Commission (A. 430).

The Court concluded, 555 F.2d at 960 (A. 431) that:

> For these reasons expressed above, we believe the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.

SUMMARY OF ARGUMENT.

The Federal Communications Commission has broad authority under the Communications Act to prevent monopolization or concentration of control over the media of mass communications. The Commission's long-standing practice of considering newspaper ownership in determining qualifications for broadcast license applicants on an ad hoc basis has been consistently upheld by the courts.

Therefore, the FCC's adoption of a rule barring future acquisition of newspaper broadcast cross-ownerships in the same market is a reasonable exercise of the agency's authority. Indeed, Congress has recently expressed its condonance of the Commission's use of its rulemaking authority in this way. Structural diversification, furthermore, serves rather than abridges basic First Amendment principles.

While a federal agency has considerable discretion to apply its rules and policies as best meets the public interest, it is restricted from arbitrary and capricious rulemaking. A court of appeals' review of an agency rulemaking is narrow, but searching. Its determination as to whether an agency has support in the record for its reasoning is narrowly reviewed by this Court.

Although the Commission has consistently found diversification to be a primary licensing goal, it denigrated this factor without rational explanation, in considering whether to apply its new one-to-a-market policy to existing cross-owners. The Commission ignored its own presumptions and policies favoring diversification,

derived from the Communications Act, in placing a burden on the public to show tangible harm from such existing cross-ownerships before requiring divestiture. Furthermore, if it were necessary, the Commission had substantial evidence of tangible harm before it.

Contrary to the Commission's view, divestiture is not a harsh and severe remedy. Nor is it a retroactive rule, since it allows licensees ample time to comply with the policy in the future. In any event, broadcasters have no property right to their licenses, which last only three years. An applicant seeking renewal, therefore, is subject to the rules and policies extant at the time of renewal, not at the time of the original grant. And broadcasters have long been on notice of the Commission's intention to promote structural diversity.

The Commission claims that it applied a wholly different standard to existing operations because it feared that disruption to the industry might result and also because it wanted to assure the public of the best practicable service. However, diversity of ownership is one element of the "best practicable service" licensing goal, and the Commission has traditionally found other individual elements of that standard to be secondary to the primary goal of diversification. Certainly this is true for the elements of "local ownership," "continuity of operation" and "local economic dislocation." The Commission's speculations about harmful effects in these areas from divestiture are unjustified by reason or by the record.

There is no reason to believe that new owners would not provide equal or better local broadcast service, as well as greater diversity of information sources.

Moreover, licensees have ample time and special tax benefits which alleviate any legitimate concern over their private economic interest. The Commission's practice of approving scores of transfer applications each year, furthermore, demonstrates the fallacy of the Commission's concern for these makeweight arguments.

The line which the Commission drew to require divestiture by some but not all licensees is arbitrary and irrational. It supposedly requires divestiture by "effective monopolies," but uses a diversity-based rather than a monopoly-based criterion to determine whether concentration in a given locality meets that standard.

Conversely, in protecting existing licensees against petitions to deny based on concentration of control grounds, the Commission adopted a Sherman Act "economic monopolization" standard, which it has since admitted it is ill-equipped to administer. The Commission has no provision, furthermore, for considering divestiture on an ad hoc basis, and will not consider showings by petitioners that the underlying goals of the general policy, *viz.*, diversity and competition, would be served by divestiture rather than renewal of license.

In sum, this case is simply a court reversal of arbitrary and capricious action by a federal agency which has lost sight of its mandate to regulate in the public, not private, interest. The Court of Appeals properly reminded the agency of its own long-standing presumptions, and attendant burdens of proof. On remand, the Commission would retain discretion to adopt a rule which does not draw arbitrary lines aimed at protecting private interests at the expense of the public's.

ARGUMENT.

I.

THE COURT OF APPEALS PROPERLY UPHELD THE COMMISSION'S AUTHORITY TO ADOPT A RULE BARRING FUTURE ACQUISITIONS OF NEWSPAPER-BROADCAST COMBINATIONS.

A. Congress Has Given the Commission the Latitude and Authority to Consider Newspaper Ownership in Licensing Broadcast Stations.

This Court has consistently upheld the broad authority of the Federal Communications Commission to adopt regulations interpreting the Congressionally delegated standards of the "public interest, convenience and necessity."[19] The Commission's power under that standard, and its mandate generally to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. §303(g) (1970), allows the agency flexibility to adopt regulations to meet the "fluid and dynamic" qualities of broadcast regulation, including those relating to concentration of control over ownership of broadcast stations. *Id.* "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).

In *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956), the Court upheld the FCC's numerical limitation on the number of broadcast licenses one person could hold nationwide, stating:

> Congress sought to create regulation for public protection with careful provision to assure fair

[19] *NBC v. United States, supra,* n. 6, 319 U.S. at 219 (1943).

> opportunity for open competition in the use of broadcasting facilities. Accordingly, we cannot interpret §309(b) as barring rules that declare a present intent to limit the number of stations consistent with a permissible "concentration of control."

And in *United States v. Radio Corp. of America,* 358 U.S. 334, 351-52 (1959) the Court accepted the possibility that

> [A]ntitrust considerations alone would keep the statutory [licensing] standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities which, if granted, would give him a monopoly of that area's major media of mass communication.

More recently, this Court upheld the Commission's authority to regulate communications media ancillary to its authority over broadcasting even absent express provision in the Act.[20]

Accordingly, the Commission's general authority to take newspaper ownership into consideration in deter-

[20] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Review of the Commission's attempted regulation of data processors in *GTE Service Corp. v. FCC,* 474 F.2d 724 (2d Cir. 1973) is not to the contrary (NAB Br. at 24-25). There the Commission's authority to regulate activities of communications common carriers in the computer field was upheld, but regulations directly controlling the computer industry were reversed as beyond the Commission's jurisdiction and intent. *Id.*, 474 F.2d at 733. The *GTE* Court specifically distinguished the newspaper-broadcast cross-ownership situation as within the agency's authority. *Id.*, 474 F.2d at 734. In the present case, the Commission is regulating qualifications for owning broadcast stations. It is not regulating newspapers. (A. 378, n. 41).

mining broadcast licensing qualifications is clear.[21] And as this Court has warned, courts should not interfere "in the absence of compelling evidence that such was Congress' intention * * * to prohibit administrative action imperative for the achievement of an agency's ultimate purposes." [22]

The American Newspaper Publishers Association (ANPA) and the National Association of Broadcasters (NAB), along with some *amici curiae*, argue that the Commission's expansive powers do not include the ability to bar newspapers from acquiring broadcast stations in the same locality. They base the argument on (1) a limited and selective review of subsequent Congressional statements, none of which resulted in an amendment to the Communications Act; (2) an opinion of one former FCC General Counsel in 1938, who was looking at a somewhat different question under different circumstances, and (3) dicta from a 1942 court of appeals decision. While the petitioners' arguments were extensively considered below and dismissed by the Court, *NCCB*, 555 F.2d at 947-54 (A. 362-88), the vigor with which the petitioners again assert various Congressional statements requires some

[21] *E.g., Greater Boston Television Corp. v. FCC, supra,* n. 12; *Joseph v. FCC,* 404 F.2d 207 (D.C. Cir. 1968); *McClatchy Broadcasting Co. v. FCC,* 239 F.2d 15 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957); *Scripps-Howard Radio, Inc. v. FCC, supra,* n. 4; *Mansfield Journal Co. v. FCC,* 180 F.2d 28 (D.C. Cir. 1950); *Plains Radio Broadcasting Co. v. FCC,* 175 F.2d 359 (D.C. Cir. 1949); *Frontier Broadcasting Co., supra,* n. 13.

[22] *United States v. Southwestern Cable Co., supra,* n. 20, 392 U.S. at 177, *quoting Permian Basin Area Rate Cases,* 390 U.S. 747, 780 (1969).

exposition beyond the Court of Appeals review. *See also Second Report,* 50 F.C.C.2d at 1051-52 (A. 144-46).

ANPA, NAB and some of their *amici* cite various Congressional statements made between 1946 and 1952. They argue that Congress has expressed its intention that the FCC not "discriminate" against newspaper owners. They treat certain legislative statements as if legislation had in fact been adopted precluding FCC consideration of newspaper ownership in licensing broadcasters.

Neither the Commission[23] nor the Court of Appeals[24] was persuaded by Congress' inaction. Indeed, the Court noted that the general use of subsequent legislative activity is not useful to determine the meaning of the original statute, *citing United States v. Wise,* 370 U.S. 405, 411 (1961). *NCCB,* 555 F.2d at 952, n. 41 (A. 378).

Nevertheless, recent Congressional actions conclusively demonstrate Congressional concurrence with the Commission's view that it has statutory authority to bar newspaper ownership of co-located broadcast stations by the rule here in issue. During the pendency of this rulemaking, and at the instigation of the NAB and others,[25] both the House of Representatives and

[23] *Second Report,* 50 F.C.C.2d at 1051 (A. 144-45).

[24] *NCCB,* 555 F.2d at 952 (A. 378).

[25] *See, e.g.,* "NAB Presses Drive for Renewal Relief," *Broadcasting Magazine,* December 4, 1972 at 38; "Whitehead Bill Joins the Crowd Seeking to Ease Renewal Trauma," *Broadcasting Magazine,* January 1, 1973 at 24-25.

the Senate adopted bills expressing their intention that the FCC not consider cross-ownership at license renewal time unless the Commission adopted rules prohibiting such interests, and gave the renewal applicant a reasonable opportunity to divest to conform to the new rules.[26] The *House Report* quotes from the *Further Notice* in Docket 18110, ¶ 34 [A. 116], where the Commission proposed through rule to require divestiture of co-located commonly owned daily newspapers and broadcast stations. It then states that "if cross-ownership is to be prohibited or management or ownership structures or their composition are to be prescribed, it must be done by rules. . . ." *Id.* at 19. There can be little question that the House Committee viewed the Commission as having jurisdiction to act as it proposed in Docket 18110.

Similarly, in the *Senate Report,* the Committee referred to the Docket 18110 proposal to bar newspaper cross-ownership of broadcast stations, *id.* at 14, and concluded, "The Commission has rules regarding multiple ownership, and there appears to be no reason why rules regarding cross-ownership would not also be appropriate." *Id.* at 15. Both the House and Senate adopted measures to require the Commission, in view of its delay, to conclude Docket 18110 within a certain time period. *House Report, supra,* n. 16, at 25; *Senate Report, supra,* n. 16, at 14-15, 22; *Congressional Quarterly Almanac, supra,* n. 26, at pp. 714-17. However, conferees were never selected in the House, and the bills eventually died. *Id.* No member of the House or Senate Commerce Committees, however, expressed

[26]*Congressional Quarterly Almanac* (Vol. XXX), pp. 714-17 (1974), *House Report, supra,* n. 16, at pp. 18-19; *Senate Report, supra,* n. 16, at pp. 14-15.

the belief that the Commission did not have the authority to consider newspaper ownership of broadcast stations or to adopt the proposal in the *Further Notice* in Docket 18110.[27]

B. The First Amendment Is Served Rather Than Abridged by a Content Neutral Rule Promoting Diversity of Information Sources to a Local Community.

ANPA (Br. at 17-26) and the NAB (Br. at 25-37) argue, again, that their individual right to broadcast should prevail over the public's right to diversity of information sources. This is a tired argument, and one which this Court has rejected many times.

"No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Red Lion, supra,* n. 3, 395 U.S. at 389, *citing NBC v. United States, supra,* n. 6, 319 U.S. at 227. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*, 395 U.S. at 390.

In upholding the FCC's Fairness Doctrine, then, the unanimous *Red Lion* Court conclusively established the validity of FCC regulations aimed at promoting diversity. And the Court in *Buckley v. Valeo,* 424 U.S. 1, 49, n. 55 (1976), reaffirmed this view where

[27]ANPA's argument in this Court to the effect that the FCC does not have authority to prohibit newspapers from becoming broadcast licensees is in direct contradiction to its position before the Commission that the Commission has denied newspaper ownership in a hearing setting in the past, and that rather than enact a rule, the Commission should continue to consider newspaper ownership on an ad hoc basis. *ANPA Comments,* Docket 18110 (A. 715-16). *See generally Reply Comments of Stephen R. Barnett* (A. 776 ff.).

it stated that "in contrast to the undeniable effect of . . . [unconstitutional campaign expenditure limitations], the presumed effect of the Fairness Doctrine is one of 'enhancing the volume and quality of coverage of public issues.' "

The Fairness Doctrine "may well mark the outer limits of a permissible diversification policy which relies on direct government control over the content of broadcast programs." *NCCB*, 555 F.2d at 950 (A. 371). But the structural ownership rules here under review are far less restrictive, from a First Amendment perspective, because they are totally content neutral. They do not ban, punish, or mandate what may be published or aired.[28]

The Commission's rules, moreover, do not restrict a licensee from publishing a newspaper. While it does not allow one making that choice to retain a broadcast license in the same locality, this is consistent with long-standing prohibitions against monopolization of the press (*Associated Press v. United States, supra*, n. 3, 326 U.S. at 20), and against domination of broadcast frequencies. Thus the Commission will not allow one entity to obtain two television licenses in the same locality; it can also refrain from issuing a broadcast

[28]This distinguishes the Commission's content neutral, structural diversity rules from the other major First Amendment cases cited by petitioners. Thus in *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), the newspaper tax was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled. . . ." And in *Miami Herald v. Tornillo*, 418 U.S. 241, 251 (1974), the Court struck down a right of reply statute which exacted "a penalty on the basis of the content of a newspaper." The Court of Appeals, furthermore, pointed out that "[f]reedom of the press does not necessarily shield newspaper publishers from regulation that may make publication more difficult." *Id.* (A. 383).

station license to one who has a concentration of other media of mass communications.

Indeed, content neutral rules aimed at maximizing information sources and mass media in a particular locality further rather than abridge the goals of the First Amendment. In addition, in view of the Commission's need, at times, to investigate allegations of behavioral abuses of local cross-ownerships,[29] structural measures taken in advance to prevent the possibility of such abuses will also promote the public interest and the First Amendment.

C. The Commission's Adoption of Its Prospective Ban Is a Reasonable Exercise of Its Discretion.

In assessing whether or not the Commission was "arbitrary or capricious" in adopting a particular rule the courts of appeals have a narrow but searching

[29]*See Mansfield Journal Co. v. FCC, supra*, n.21, 180 F.2d at 35 ("the way the newspaper is operated in relation to other media of communication is material"). *See also Chronicle Broadcasting Co.*, 16 F.C.C.2d 882 (1969), *renewal granted*, 40 F.C.C.2d 775 (1973). As some have suggested, continued cross-ownerships may invite the government into the newsrooms of newspapers or broadcast stations in order to investigate legitimate claims, supported by extrinsic evidence, of news management, and other abuses contrary to the public interest. Oral Argument of then NCCB Counsel, Frank W. Lloyd (A. 925, 928-29); S. Barnett, "Cross-Ownership of Mass Media in the Same City." (*Barnett Report*) (A. 990, 1001-02, 1011-21, and articles cited therein).

Petitioners have suggested that the *Barnett Report* was not properly before the Court of Appeals because they allege it was not officially part of the record. Certainly the Commission had an opportunity to pass upon it, however, since Commissioners Hooks and Robinson each referred to it in their dissents. *Second Report*, 50 F.C.C.2d at 1108, 1120, n. 17 (A. 269, 293). This is sufficient to meet the statutory test of 47 U.S.C. §405. *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972). And as the Court of Appeals noted, "much of the report consists of discussion of cases in the public record. . . ." *NCCB*, 555 F.2d at 959, n. 71 (A. 403).

scope of review, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), while that of this Court is more narrow and circumscribed. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974).

The Commission need not await the feared result before acting to prevent the potential for abuses of concentrations of control over the mass media, and to foster diversity.[30]

The Commission has traditionally taken newspaper ownership into account in licensing broadcast stations,[31] and the present rule is a codification and extension of existing Commission practice. By adopting a rule, rather than continuing to proceed on an ad hoc basis, the Commission is protecting newspaper owners from investing in an operation where renewal expectancies may in some instances be outweighed at renewal time by the diversification factor. See *Citizens Communications Center v. FCC, supra*, 447 F.2d at 1213-14, n. 36 (1971).

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[30]*See, e.g., Buckley v. Valeo, supra*, 424 U.S. at 29, 49, n. 55, where the Court upheld a limitation on campaign contributions in part because of the potential for abuse, and alluded to the Fairness Doctrine's "presumed effect" to increase the total amount of speech. *Accord: Red Lion, supra*, n. 3, 395 U.S. at 393; *United States v. Southwestern Cable Co., supra*, 392 U.S. at 176-77 (Commission can plan in advance with cable television, instead of waiting to react to events); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953) ("the possible benefits of competition do not lend themselves to detailed forecast"); *GTE Service Corp. v. FCC, supra*, n. 20, 474 F.2d at 731 (certain prohibitions imposed against communications common carriers relating to data processing affirmed on "potential domination" rationale); *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 487 (2d Cir. 1971) (primetime access rule affirmed on potential of curbing competitive restraints and network dominance in syndication); *First Report, supra*, 22 F.C.C.2d at 311, ¶ 20 (A. 43) ("remedial action need not await the feared result").

[31]*See supra*, n. 21.

Adoption of the rule based on the Commission's intent to foster diversity of expression, even without evidence of past abuses, is reasonable because the Commission has long presumed that "it is unrealistic to expect the same level of diversity [from commonly owned mass media entities] as would be offered if the entities were under separate ownership." *Reconsideration*, 53 F.C.C.2d at 592, n. 9 (A. 323). See also *Second Report*, 50 F.C.C.2d at 1050, ¶ 14 (A. 142) (need for diversified ownership). "[C]entralization of control over the media of mass communications is, like monopolization of economic power, per se undesirable." *First Report*, 22 F.C.C.2d at 310, ¶ 17 (A. 41).

In sum, as the Court below held, "[t]he prospective ban is an attempt to promote diversity without government regulation or supervision over speech." *NCCB*, 555 F.2d at 950 (A. 373). The Court observed after reviewing the record here that although there is no guarantee that the prospective ban will increase diversity, this did not make the attempt irrational nor was it unreasonable for the Commission to license an independent new voice. *Id.* (A. 374). "The 'search for truth,'" the Court stated, "will be facilitated by government policy that encourages the maximum number of searchers." *Id.* at 951. (A. 374).

II.

THE COURT OF APPEALS CORRECTLY FOUND THE COMMISSION'S SECOND REPORT ARBITRARY IN THE APPLICATION OF ITS NEW CROSS-OWNERSHIP STANDARDS TO EXISTING COMBINATIONS.

Having found that the Commission was authorized and that it acted reasonably in applying its "duopoly" rules to local newspaper-broadcast cross-ownerships, the Court of Appeals then looked to whether the Commission's enforcement mechanism for applying the new standard to existing cross-ownerships was reasonable. For, while the Commission applied the standard to future acquisitions and certain small licensees who controlled absolute monopolies in their cities, it exempted and indeed immunized all other cross-ownerships in the country, regardless of the degree of concentration they held.

The Court thoroughly searched for a rational basis for the Commission's action, but found the record bare of factual support and the premise of its action unreasoned. The Commission argues that for existing combinations, other factors such as "best practicable service" and disruption to the industry and individual owners come into play. But as we demonstrate below, the Court correctly held that all of the Commission's fears of "harmful effects" from divestiture were groundless, its application of countervailing factors irrational, and that the Commission inexplicably abandoned its traditional presumption in favor of diversification of media outlets.

A. The Commission Erred in Its Assessment of the Burden of Proof in This Proceeding.

The Court of Appeals correctly held that the Commission erred in requiring the public to show evidence of tangible harm from cross-ownerships before requiring across the board divestiture.[32]

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[32]Moreover if such evidence were necessary, the Commission had sufficient evidence before it to act affirmatively on the divestiture issue. Contrary to the Commission's statements, there are numerous examples of detriments, including actionable abuses warranting a hearing on denial of license from co-located newspaper-broadcast cross-ownerships. *E.g., WGAL-Television, Inc., supra,* n. 17 (newspaper preference of TV station); *Western Connecticut Broadcasting Co.,* 47 F.C.C.2d 432, 433-35 (1974) (concentration extreme and possible discrimination against political candidates); *WPIX, Inc.,* 20 F.C.C.2d 298, 300 (1970) (news management, but no concentration of control issue designated); *Chronicle Broadcasting Co., supra,* n. 15 (news management); *Midwest Radio-Television, Inc., supra,* n. 12 (cross subsidizations); *WHDH, Inc., supra,* n. 12 (lack of editorializing).

In large part, however, any deficiencies that do exist in the record can be attributed to the Commission's unwillingness to examine such issues when they were presented in licensing and complaint proceedings. Instead, the Commission has for years deferred examination of actual evidence in deference to its overall examination of its policies carried on in this rulemaking. *See, supra,* nn. 14-15.

Furthermore, the Commission is very reluctant to designate allegations of abuse of a cross-ownership for hearing unless the case is well-established. Yet it is nearly impossible to meet the Commission's burden for hearing without discovery procedures, which, in Catch 22 fashion, are not available until a case is set for hearing. *See, e.g., Bilingual Bicultural Coaltion on Mass Media v. FCC,* 492 F.2d 656, 659 (D.C. Cir. 1974); *Hale v. FCC, supra,* n. 14, 425 F.2d at 566 (Tamm, *concurring*).

There were, in addition, many allegations in individual cases before the Commission which, while perhaps not warranting a renewal hearing in every case, nonetheless offered the Commission the opportunity, had it been truly interested, to pursue the matter in rulemaking. These include allegations raised in *Newhouse Broadcasting Corp. (WAPI-TV),* 59 F.C.C.2d 218, 231-39 (1976); *Daily Telegraph Printing Co.,* 59 F.C.C.2d 185 (1976); *McPherson Broadcasting Co.,* 54 F.C.C.2d 565

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By placing the burden on those who sought diversification over concentration, the Court found, the Commission had acted in a manner contrary to the general presumption that precipitated the rulemaking and ultimately the prohibition against future cross-ownerships: namely that the Communications Act,[33] the First Amendment,[34] and the Commission's long-standing

(1975); *A. H. Belo Corp.*, 46 F.C.C.2d 1075, 1081-88, 1091 (1974); *RadiOhio, Inc.*, 38 F.C.C.2d 721, 751 (1975) (Johnson, *dissenting*), *aff'd sub nom. Columbus Broadcasting Coalition v. FCC, supra*, n. 14. *See* Johnson & Dystel, *A Day In The Life: The Federal Communications Commission*, 82 *YALE L. J.* 1575, 1607 (1973).

In addition, Professor Steven Barnett's extensive documentation in "Cross Ownership of Mass Media in the Same City" (A. 990-1051), lists many instances from public records of non-coverage, non-editorializing, news management to favor business interests, economic tie-ins between newspaper and broadcast station advertising, and the like. Also, the Commission heard personal testimony at oral argument as to the detrimental effects of cross-ownerships in several cities. (A. 923, 933-42). *See generally*, Commissioner Robinson's dissent at A. 291.

The Commission's Conglomerate Study Report might also have contained important information. Although the pilot study did reveal abuses, *see* Green, "Conglomerate Broadcasters Are Faulted in FCC Pilot Study, Wider Inquiry Slated," *Wall Street Journal*, August 11, 1970, p. 32, the Commission has refused to reveal large sections of its final report. *National Citizens Committee for Broadcasting*, 56 F.C.C.2d 476 (1975), 57 F.C.C.2d 1060 (1976).

Finally, the Commission has recently designated an "undue concentration of control" issue in a comparative renewal proceeding, based on the grandfathered renewal applicant's proposed extension of its service, citing the "duopoly" policy as of "overriding decisional significance" and expressing "concern for diversity and competition." *McClatchy Newspapers*, 40 P&F Radio Reg. 2d 1393, 1403-04 (1977).

[33]*E.g.*, 47 U.S.C. §303(g) (1970) obligates the Commission to "encourage the larger and more effect use of radio in the public interest." *NCCB*, 555 F.2d at 962-63. (A. 417).

[34]*E.g.*, "The First Amendment 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues. . . .'" *NCCB*, 555 F.2d at 963 (A. 417-18), *citing Associated Press v. United States*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd* 326 U.S. 1 (1945). *See also Red Lion, supra*, n. 3, 395 U.S. at 390.

policy[35] favored diversification.[36] Once the Commission adopted the general proposition, the Court held, consistency required that the burden should properly have shifted to the cross-owners to demonstrate why their concentrations serve the "public interest, convenience and necessity." 47 U.S.C. §309 (1970). Instead, the Commission deferred to the private economic interests of the licensee over diversity and competition in the media.

The Court's view is, we submit, beyond cavil, for if the First Amendment is truly "the matrix, the indispensable condition, of nearly every other form of freedom,"[37] then the Commission's presumption for diversity, contained in the first 107 paragraphs of the *Second Report* should have been applied for all cross-ownership situations, absent a valid and reasonable basis for distinction.

B. The Commission Did Not Adequately Explain Why Its Diversification Presumption in the Prospective Rules Was Denigrated When Applied to Most Existing Combinations.

As detailed above, the FCC has established that separate ownership of a daily newspaper and a broadcast station in the same market is required in the public interest. The Commission articulated its rationale as follows:

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[35]The Court cited numerous such pronouncements at 555 F.2d at 944-45, nn. 6-9 (A. 350-52).

[36]Moreover, while the Court found the record inconclusive for both sides, it suggested that a compelling factual showing of a pattern of abuses was unlikely, if not impossible. *NCCB, supra*, 555 F.2d at 961 (A. 412-13).

[37]*Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

> If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. . . . [I]t is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run. *Second Report,* 50 F.C.C.2d at 1079-80, ¶ 111 (A. 200).

In part this was based on the Commission's specific finding that newspapers and television stations are a community's principal source of information on local issues. *Id.* at 1083, ¶ 115 (A. 207-08).[38]

Additionally, the Commission stated that it believed that "the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility" (¶ 111; A. 200). The Commission even announced a policy of awarding tax certificates to licensees "in non-divestiture cases where current combinations are sold to separate owners in order to come into compliance with the new [anti-cross-ownership] policy underlying the rule." *Id.,* 50 F.C.C.2d at 1085, n. 45 (A. 211). The Commission could not have adopted this stance if the general policy had not been to declare cross-ownership as contrary to the public interest. *Tax Certificates,* 19 P&F Radio Reg. 2d 1831, 1832 (1970).

[38] *See also* the *Further Notice* in 18110:

> In view of the primary position of the daily newspaper of general circulation and the television broadcast station as sources of news and other information, and discussion of public affairs, particularly with respect to local matters, *it is not desirable that these two organs of mass communication should be under the same control in any community.* A direct parallel would be the ownership of two television stations in the same community by the same person, which the Commission without substantial disagreement from any source, has never permitted. *The functions of newspapers and television stations as journalists are so similar that their joint ownership is, in this respect, essentially the same as the joint ownership of two television stations.* 22 F.C.C.2d 339, 346 (1970) (emphasis added). (A. 115).

See also U.S. News and World Report, April 18, 1977, p. 36, where decisionmakers placed television second and newspapers tenth of all national institutions in terms of influence.

Yet the Commission refused to require that its policy be implemented by existing combinations. Instead, without evidence to support a view contrary to the one stated above, it held diversity to be "abstract" and "a mere hoped for gain." *Id.,* 50 F.C.C.2d at 1078 (A. 197-98). Moreover, it never explained this discrepancy, except to refer to the other factors—basically the Commission's speculation as to "the possibility of disruption for the industry and hardship for individual owners" from divestiture—which it believed outweighed the diversification criterion. But the other factors do not explain why diversity would be abstract in the context of present combinations. In fact, divestiture would result in a direct, real and obvious gain in diversity.[39]

[39] For instance, in Washington, D.C., recently announced divestitures by the *Washington Star* and the *Post* of their television licenses will result in six instead of four owners of major daily newspapers and VHF television stations in the market. See "WMAL-TV Fetches $100 Million, Trading Record," *Broadcasting Magazine,* April 4, 1977, p. 28, and "Two More Cross-Owners Go Thataway," *Broadcasting Magazine,* December 12, 1977, p. 19. Both of the divestitures are still subject to FCC approval.

C. The Commission's Grounds for Preferring Grandfathering Interests of Existing Licensees Over the Public's Interest in Diversity Are Arbitrary and Unsupported by the Record.

Basically, this appeal comes down to whether the Court of Appeals reasonably found that the Commission lacked record support for its fears of harmful effects of divestiture as weighed against the presumed benefits. Without reasoned analysis or record support in this proceeding, the Commission determined that the possible losses of "continuity of ownership," "local ownership" and "local economic dislocations" outweighed the public interest mandate for diversity. *Second Report, supra,* 50 F.C.C.2d at 1078, ¶ 108 (A. 197). The Commission's decision, when viewed against prior decisions, policies, and the inconclusive facts of record, is clearly arbitrary.

1. Local Ownership and Integration of Ownership and Management.

Although the Commission cites the fact that approximately 75% of newspaper-television cross-owners are locally owned, it did not indicate how many and to what degree local owners participated in the actual operation of the stations.[40] The Commission has traditionally discounted local ownership as a positive factor to the extent that the ownership did not participate in the day-to-day operation of the station. *1965 Policy Statement, supra,* 1 F.C.C.2d at 395. Furthermore, the Commission did not consider whether local ownership is necessarily a positive factor in a cross-ownership situation.[41]

[40]The great majority of licensees claimed that their newspapers and TV stations were operated separately. "Were it otherwise [the Commission commented] and the two operated jointly, it might have been necessary for the Commission to act to require divestiture in many more situations." *Id.* at 1089, ¶ 131 (A. 219).

In fact, the Court noted that the Commission routinely approves voluntary sales to distant, absentee buyers. Indeed, the Commission's primary policy in Docket 18110 was to bar local newspapers from acquiring local television licenses because diversity was found to outweigh local ownership. And certainly there was no reason to grandfather absentee owners on the basis that other cross-owners were local owners. The Commission appears to concede this in admitting that this consideration "would not apply in every case." (FCC Br. at 26).

Finally, as the Court of Appeals pointed out, about one quarter of the cross-owned licensees are themselves absentee owners, so divestiture could improve those situations. "[T]here is no reason to suppose that local entrepreneurs will not find television an attractive investment." *NCCB,* 555 F.2d at 964. (A. 421).

2. Continuity of Operation.

The Commission stated that divestiture might disturb "continuity of operation . . . as the new owner would lack the knowledge of the community and would have

[41]*See e.g., W. T. GORMLEY, JR., THE EFFECTS OF NEWSPAPER-TELEVISION CROSS-OWNERSHIP ON NEWS HOMOGENEITY,* (Univ. of North Carolina, *Chaptel Hill* (1976) at 214-15. Professor Gormley observes that local cross-ownerships involve a greater tendency of news overlap and therefore less actual diversity, as employees would perceive the owner's interests and pursue them. His findings include (1) 9.3% of television stations owned by a newspaper receive carbons of the latter's stories on an exclusive basis as opposed to 1.1% of comparable non-affiliated television stations; (2) cross-ownership increased news story overlap by 16.7%; and (3) 52% of the cross-owned television stations never editorialize, as opposed to 25% of non-affiliated stations. *Id.* at pp. 112, 210-12.

to begin raw." *Second Report*. 50 F.C.C.2d at 1078. (A. 197).[42] But as Commissioner Robinson pointed out, holdovers in high-level management often smooth the transition period (*id.* at 1128; A. 309), even assuming some unusual disruption from divestiture. Further, 79 television divestitures over a five-year period, for example, simply do not constitute disruptions inconsistent with the public interest. If they did, the Commission's position would again be at odds with its practice of routinely approving license assignments. In the five-year period 1969-1973, for example, the Commission processed 165 voluntary television transfers.[43] In addition, the number of necessary divestitures is now further reduced, and the Commission did not really consider that in many instances companies can be expected to retain the television station and sell the newspapers.

Nor did the Commission explain in its decision how the alleged break in continuity would disserve

[42]Presumably, this is also what the Commission meant when it said that it would not order divestiture because of the "possibility of disruption for the industry." *Id.* at 1078, ¶ 109. (A. 198). Ironically, after five years of deferring to this rule-making, virtually all ad hoc challenges on concentration of control grounds—in order to consider the matter on an industry-wide scale (*see, e.g., Hale v. FCC, supra,* n. 14)—the Commission refused to require widespread divestiture partially on grounds of "disruption to the industry." However, the Commission elsewhere admitted that "trading of stations would tend to lessen concern based on financial losses or investment uncertainty." *Second Report,* 50 F.C.C.2d at 1080, n. 29. (A. 201). And the Commission failed to take into account the net gain, in terms of stability, resulting from the reduction of petitions to deny and competing applications based on a challenge to a licensee's "undue concentration of control." *See supra,* n. 32.

[43]*See* F.C.C. Annual Reports 1969-1973, pp. 130, 144, 148, 167, 201, respectively. In the six years prior to the *Second Report,* the Commission approved without hearing 678 license assignments, at least 40% of which were not *pro forma. NCCB,* 555 F.2d at 964, n. 99. (A. 423).

the public, as opposed to the private interests. As the Commission itself stated, "the Commission's function is not to protect stations from competition and the public interest is not disserved even at a station's demise, so long as another takes its place in providing public service programming." *Second Report,* 50 F.C.C.2d at 1075, n. 20 (A. 190). Similarly in *WLVA, Inc. v. FCC,* 459 F.2d 1286 (D.C. Cir. 1972), the Court held that where a licensee complains of insufficient funds in the market for a new entrant—a "Carroll" issue—the existing licensee must not only show that the insufficient revenues would lead to a net reduction of its public service programming, but also that this loss of public service programming "will not be offset by the increased non-network programming proposed to be offered by the applicant." *Id.* at 1297.

The Commission, however, cited no evidence to the effect that new licensees would be inferior to prior owners. *NCCB,* 555 F.2d at 964, n. 98 (A. 423). This latter point is reinforced by the Commission's statement that whatever superiority in performance their staff found in newspaper-owned television stations, it "was in no way shown to be a result of the fact of owning a newspaper. . . ." *Reconsideration,* 53 F.C.C.2d at 592 (A. 324).[44]

Indeed, the record shows that new owners are often more responsive to the local community. Usually a new entity in town tries harder to be accepted, see, *e.g.,* Testimony of James Alexander, Executive Director

[44]This Commission statement directly contradicts its own claim before this Court that "Divestiture introduced the danger of disrupting this proven, superior service—to the detriment of the public interest." FCC Br. at 24. It also disposes of Channel Two's similar claims in its Brief at 48.

of FACT, Inc., New Haven, Conn. (A. 941-42), whereas existing cross-owners do not have similar incentives. See, *e.g.*, Testimony of Nancy Schmidt, Chairperson, St. Louis Broadcast Coalition (A. 951-53). Thus the evidence in the record directly contradicted the Commission's speculations. Every representative of the listening or viewing public who presented evidence spoke in favor of divestiture; none spoke for retention of existing stations' programming service. In the only case where a newspaper licensee was replaced, moreover, the new licensee has performed excellently, and consistently rates at the top of all stations in the country in airing locally produced programming at prime-time.[45]

Channel Two and the Commission also argue that continuity is a positive good in itself, citing the Commission's anti-trafficking rules. (Channel Two Br. at 46-47; FCC Br. at 24). But as the Commission's citation to *Crowder v. FCC*, 399 F.2d 569 (D.C. Cir. 1968) demonstrates, trafficking offends the public interest mainly because it is the acquisition of a license with the intent to keep huge profits rather than to serve the public. *Id.* at 571. Loss of continuity of service is a footnote, which when applied to the cross-ownership rules becomes "makeweight."[46] *Second Report*, 50 F.C.C.2d at 1128 (A. 308) (Robinson, *dissenting*).

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[45]*See, e.g.*, E. Koch, "WCVB: Carrying the Torch," 29 *Access Magazine* 13 (1976) (showing high national rankings of the station that replaced WHDH-TV in Boston).

[46]Moreover, even in the context of trafficking the Commission presumes, in the normal course, that questions with regard to continuity will arise only if a license is transferred within the first three year license period. *See* 47 C.F.R. §1.597(a) (1976).

Furthermore, as the Court of Appeals pointed out, "A one-time alteration in the ownership structure of the broadcast industry should not affect the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." *NCCB*, 555 F.2d at 964. (A. 422).

Finally, the Commission has in the past prevented transfers where the applicant proposes to diminish service to the public. *City of Camden*, 18 F.C.C.2d 412 (1969). It can do so again if the problem arises in the context of these divestitures.[47]

3. Economic Dislocation.

The Commission's third countervailing consideration was that "local economic dislocations" would in some way affect the public interest. (FCC Br. at 26-27). The Commission explains that the demand for equity capital might lead to a reduction of working capital available for programming, with a resultant possibility of diminution in public affairs programming.[48]

This rationalization, however, also lacks a reasonable or factual basis. The Court observed, for example,

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[47]The Commission's inaccurate claims (FCC Br. at 24-26) that it has not generally required divestiture upon adoption of new ownership rules is answered *supra*, n. 10.

[48]Channel Two notes references in the Commission's opinion for these statements (Channel Two Br. at 49, n. 79), as does the Commission (Br. at 27). However, their references to ¶¶ 57 and 77 of the Commission's decision are to the Commission's *summary* of broadcasters' allegations. The Commission conclusions, however, were totally speculative: "Local economic dislocations are also *possible* as a result of the vast demand for equity capital and widescale divestiture *could* increase interest rates and affect selling price too." *Second Report*, 50 F.C.C.2d at 1078, ¶ 108 (emphasis added). (A. 197). In fact, the Commission itself had elsewhere found that the pessimism towards reduced selling prices "may be exaggerated." *Id.* at 1072, ¶ 95 (A. 186).

that the same concern for availability of capital would be present in the case of voluntary transactions, which the Commission does permit. *NCCB*, 555 F.2d at 965 (A. 425).

Furthermore, the Commission has heretofore taken an approach to licensing directly contradictory to that it now claims overrides diversity. Thus, in *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 737-38 (D.C. Cir. 1976), the Court of Appeals affirmed the Commission's refusal to look at finances for programming as an element of the public interest. Unwilling to look at renewal time to the amounts or percentages of revenues a licensee reinvests into public service programming, the Commission cannot turn around and claim this same factor as overriding the diversity standard.

Similarly, the Commission cannot look to the long continuity of ownership by its newspaper cross-owners and then suggest that they would lose money by selling their licenses. These licensees have long ago recouped their investments, will receive indefinite deferral on capital gains taxes, 26 U.S.C. §1071 (1970), and if they still cannot recoup a fair price, the Commission will consider a waiver, 50 F.C.C.2d at 1085, ¶ 119, n. 46 (A. 211). Furthermore, while interest rates could conceivably be increased by numerous divestitures, prices would be reduced. The Commission made absolutely no factual evaluation of this question.

The petitioners admit that this criterion and the local ownership factor "are of relatively peripheral importance" (Channel Two Br. at 49) and "[not sufficient] in itself [to] outweigh the benefits possibly to be derived from divestiture" (FCC Br. at 27). As

we have demonstrated, they are also unsupported by reason, the record, or law.[49]

4. Unfairness to Existing Licensees.

The Commission expresses, in addition, a concern that it had earlier encouraged newspaper owners to enter the field, that these licensees have in many cases displayed good records of service, and that uprooting them would work "an inherent hardship, quite apart from any question of financial gain or loss." (FCC Br. at 27). The Commission refers to these factors as "legitimate renewal expectancies," which it now claims, "should not be destroyed without good cause." *Id.*[50]

a. *Divestiture Is Not Retroactive Rulemaking.*

However, this approach to divestiture misapplies the relevant law. A broadcaster has no vested right to its

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[49]Petitioners also appear to have abandoned any suggestion that divestiture would be detrimental to co-located newspapers. The argument was assessed by the Court at A. 425-26, and by Commissioner Robinson at A. 311-13. Both concluded that there is no record support for any such fears, and that if there were a "failing newspaper," waiver could be granted. Furthermore, if newspaper support were a Commission concern, there is no valid reason why a newspaper cannot be subsidized by profits from a broadcasting station in another city or through other investments made from the sale of the co-located facility.

[50]These factors are, of course, ones involving private interests rather than the public interest. For example, the Commission expresses concern for those newspaper owners who were allegedly encouraged to start broadcast stations in their communities by the Commission. But the fact of the matter is that these broadcasters have benefited from obtaining the most powerful frequencies in their cities which, if anything, warrant concern in the context of this proceeding because of their strength in preventing the entry of competitors. It should also be noted that the Commission's order extends this concern for the private interest to even those licensees who must divest within five years by shielding them from statutorily provided challenges. *See Second Report*, 50 F.C.C.2d at 1088-89, ¶ 130 (A. 218-19).

license beyond its three-year term.[51] Furthermore, the same public interest criterion applies to both initial and renewal applications. As this Court stated in *Ashbacker Radio Co. v. FCC*, 326 U.S. 327, 332 (1945), "licenses for broadcasting stations are limited to three years, the renewals being subject to the same considerations and practice which affect the granting of original applications."[52]

The courts have also held that an agency may adopt rules of general applicability without having to hold hearings on every application which such rules affect.[53] And broadcast renewal applications are subject to rules

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[51]47 U.S.C. §§301, 304, 307, 309(h) (1970) (A. 27-31); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

Section 304, not reprinted in the Appendix, provides:

> No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 309(h) provides in pertinent part:

> [E]ach license shall contain . . . a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right in the use of the frequencies designated in the license beyond the term thereof. . . .

[52]*See also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) ("although investment in broadcasting stations may be large, a license may not be issued for more than three years"); *Fed. Radio Comm'n v. Nelson Bros.*, 289 U.S. 266, 282 (1933); *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1207 (D.C. Cir. 1971) ("the Communications Act itself places the incumbent in the same position as an initial applicant.")

[53]*FPC v. Texaco*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co., supra*, n. 3; *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968); *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir.), *cert. denied*, 389 U.S. 844 (1967); *American Airlines, Inc. v. CAB*, 359 F.2d 624 (D.C.Cir. 1966) (en banc).

in effect not when the initial grant was made, but at the time of renewal.[54]

Thus, application of revised ownership rules to existing licensees at the time of renewal is not a "retroactive rule."[55] Had the Commission proceeded to revoke

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[54]*E.g., Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 342 (D.C. Cir. 1962). *See also* the dissent in *American Airlines, Inc. v. CAB, supra*, n. 53, where even the dissenting judges agreed that the FCC, unlike the CAB, could act retroactively because "the Communications Act of 1934, . . . [unlike the Civil Aeronautics Act of 1938] gives the FCC broad powers to make frequencies available by rule amendment." 359 F.2d at 635, n. 3 (Burger, J., *dissenting*).

[55]The extensive documentation by some petitioners and *amici* of the ability of an agency not to apply a rule retroactively is thus inapposite. In any event, the Court of Appeals here reversed primarily on the Commission's arbitrariness in the manner it treated the issue, not that an agency must always apply its rules retroactively. *See* Counterstatement, *supra*, Section C.

Channel Two and the Commission have also misconstrued the case law. Both citing to, among other cases, *South Terminal Corp. v. EPA*, 504 F.2d 646, 674 (1st Cir. 1974), they claim that the courts have upheld "routine grandfathering" (Channel Two Br. at 40, n. 60), and that the EPA has refrained from applying "more stringent standards to existing facilities." (FCC Br. at 28).

In fact, however, the *South Terminal* Court held to the contrary. At the cited page the Court affirmed a new air quality plan for Boston, "[p]ending opportunity to review the proposed variance provision. . . ." *Id.* This is akin to a requirement for waiver provisions. Furthermore, the Court went on specifically to uphold the plan's application of reduced parking space requirements to a garage which was under construction on the date the plan was promulgated. In language directly analogous in the context of the licensing scheme for broadcasting, the Court of Appeals stated:

> We do not see any "retroactivity" here. The regulations do not penalize South Terminal for any conduct which, when engaged in, was permitted. At most they abrogate, for the future only, expectations South Terminal may have acquired in the past. But all changes in the law dash expectations when they make tomorrow's rules different from yesterday's. . . . *South Terminal, supra*, 504 F.2d at 678, *quoted with approval in K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES*, p. 166 (1976).

all licenses not in accordance with its new standards, the licensees would have a valid argument of retroactive application. But here, licensees required to divest would have an extensive five-year time period within which to comply with the rules.

Certainly when the Commission changed its rules and policies to require licensees to abide by new hours for presunrise operation, for example, no licensee had any ground to complain of retroactivity or of denial of their rights to a hearing. ***WBEN, Inc. v. FCC,*** ***supra,*** n. 53. The only difference is that the rules here in issue look towards ownership of the license itself, as opposed to modifications of the rules for the times certain stations may broadcast.

b. *Divestiture Is Not Severe or Harsh.*

Congress has long recognized, however, that changes in FCC ownership rules may require divestiture. Indeed, in 1944 Congress amended the Internal Revenue Code to foster such divestitures by means of tax certificates. These certificates allow for deferred payment of capital gains taxes on properties sold or exchanged to effectuate a change in FCC ownership rules. 26 U.S.C. §1071 (Appendix herein). Thus, divestiture is at worst a special case which Congress has specifically approved of and provided for in the context of FCC ownership rule changes. This legislation, furthermore, diminishes any view of the remedy as "severe" or "harsh."

In fact, divestiture does not impose a forfeiture of any kind on licensees. While a licensee is prohibited by law from holding a property interest in its license, many licenses are sold for great sums beyond the tangible property value, basically on the value of having a government enforced monopoly over a given fre-

quency in an assigned city.[56] Moreover, waivers are allowed if licensees cannot obtain "fair value" for their facilities.[57]

In the past the Commission has not taken the view that divestiture is "harsh" when it was required in order to effectuate a change in ownership policies. Indeed, while there are some exceptions, the Commission has usually adopted a divestiture requirement in such circumstances.[58] Most often when the Commission has grandfathered, it has served the purpose of continuing a certain level of service or of diversity.[59] Finally, the divestiture remedy is commonly employed for concentrations of control in antitrust cases. *United States v. E. I. DuPont de Nemours & Co.,* 366 U.S. 316, 326-35 and nn. 11-13 (1961).

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[56]*See, e.g., "WMAL-TV Fetches $100 Million, Trading Record," Broadcasting Magazine, supra,* n. 39, describing sale of one television station for approximately $100,000,000. Under recent FCC orders, licensees currently pay no fees to the government for use of the frequency. *Public Notice,* FCC-1197, December 23, 1976.

[57]*Second Report,* 50 F.C.C.2d at 1085, ¶ 119 and n. 46 (A. 211).

[58]*See* list of Commission ordered divestitures, *supra* at n. 10. This disproves the Commission's argument at p. 28 of its Brief that it has usually and routinely grandfathered licensees in adopting multiple ownership rules.

[59]Thus, the Commission's list of instances where it has grandfathered (FCC Br. at 28) includes allowing CATV to continue importation of distant signals, *CATV Rules,* 2 F.C.C. 2d 725, 785 (1966) and 36 F.C.C.2d 143 (1972), and allowing radio stations to continue to serve certain areas. However, the grandfathering there was to allow the audience to keep the diversity of signals they already had. *E.g., CATV Rules, supra.*

Requiring divestiture, on the other hand, would simply replace one owner with another, the latter presumably to provide the community with a greater diversity of expression. The Commission, furthermore, has specifically found that any small superiority in past broadcast service by newspaper owners "was

(This footnote is continued on next page)

5. Best Practicable Service.

Furthermore, the Commission's concern with "best practicable service," (FCC Br. at 5, 23-24) is misplaced insofar as it fails to consider diversity. Diversity, the Commission has recently pointed out, is one element of the general goal of "best practicable service" even in renewal proceedings.[60] Moreover, when the Commission has in the past weighed diversity against the best practicable service in a non-renewal situation, diversity has prevailed. *Terre Haute Broadcasting Corp.*, 25 F.C.C.2d 348 (1970). For instance, in *McClatchy Broadcasting Co. v. FCC, supra,* n. 21, the Commission preferred the applicant serving the diversification goal

in no way shown to be a result of the fact of owning a newspaper, but rather could just as well be explained in terms of journalistic tradition and pioneering broadcast operations." *Reconsideration, supra,* 53 F.C.C.2d at 592 (A. 324).

[60]As the Commission stated, in discussing an earlier *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants,* 22 F.C.C.2d 424, *recon. denied,* 24 F.C.C.2d 383 (1970), *rev'd sub nom. Citizens Communications Center, supra,* n. 4:

> Under this policy, consideration of the characteristics normally explored in a comparative hearing involving new applicants, i.e., *diversification of the media . . . as well as other elements of the "best practicable service" objective* [citing the *1965 Policy Statement, supra*] would not be necessary [where a licensee's past operation was solid].

Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 40 P. & F. Radio Reg. 2d 763, 765 ¶ 4 (1977), *appeal pending sub nom. National Black Media Coalition v. FCC,* D.C. Cir. No. 77-1500.

NCCB cites this as the most recent Commission statement on this issue, although it would appear that this characterization is not completely consistent with past cases. Nevertheless, it is logical that if diversity is a primary goal, it would in fact be one element in any determination of the best practicable service. It is certainly preferable, as a content neutral measurement, to any governmental attempts to delve into the content of particular programs, although the latter may be necessary in extreme cases. *E.g., Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966).

over a competing applicant who was superior in all other comparative criteria.

These decisions are consistent, moreover, with the *1965 Policy Statement, supra,* where the Commission considered diversification the single most significant factor in selecting a licensee, while "past broadcast record" is only sixth in importance. Surely here, in the context of a rulemaking, diversification should take precedence over local economic dislocations, local ownership (without regard to whether the owners are integrated into management), "continuity of service" and the private interests of certain licensees.

* * *

In sum, then, the Court of Appeals correctly found that the evidence did not support the Commission's grounds, that the grounds were unreasonable, and that the Commission failed to apply its own statutory and administrative presumption in favor of diversity to the hard facts before it.

III.

THE COMMISSION'S STANDARDS FOR DIVESTITURE AND FOR AD HOC CHALLENGE ARE IRRATIONAL.

The Court of Appeals, in summarizing its decision, stated the effect of the Commission's rule as follows:

> [T]he lines thus drawn between future and present co-located combinations and between the 16 egregious cases [that must divest] and all other present co-located combinations were arbitrary and capricious.

NCCB Order on Motion for Stay of Mandate, 555 F.2d at 968-69 (A. 440).

The Court thus found the two lines, drawn among the three groups, irrational. The first line—that of

distinguishing between future and existing licensees—has been addressed in the previous section. The Commission did not have a rational basis for preferring certain lesser policy criteria over the Commission's strong interest in diversification.

The second line—that of differentiating among existing licensees—is perhaps more complex because it involves two separate criteria. The first is that criterion for placing existing licensees in the divestiture category, or, to, in effect, treat existing cross-ownerships like future ones. As we explain below, the Commission used an "effective monopoly" standard here.

The second aspect of this line is the standard for considering whether any remaining licensee not required to divest under the "effective monopoly" standard ("the egregious 16") should also be placed in the divestiture category. This is the so-called ad hoc standard, and it too was arbitrary and capricious.

Generally both the divestiture standard and the ad hoc standard suffer from the irrationality of the Commission's failure to relate the standards to the underlying purposes of the rule in issue.

A. The Standard for Divestiture.

The Commission imposed divestiture in 16 "egregious" cases of what the Commission described as "effective monopolies." *Second Report*, 50 F.C.C.2d at 1081 (A. 203). Yet its standard for selecting such effective monopolies did not use Sherman Act or other monopoly definitions but rather a diversity-based standard. Licensees were exempt unless there were no other incoming signals in that broadcasting service of city-grade strength.

The Commission's "one incoming signal" standard, which, if met, places a concentrated licensee in the more favored class,[61] immediately exempts cross-owners in every medium-sized and large market in the country. Yet, under various criteria measuring concentration of control, certain licensees required to divest are not as concentrated as some who are grandfathered. *Compare, e.g.*, Albany, Georgia with Elkhart, Indiana in RAND's "Concentration Indices." (A. 979). And, if diversity is truly the Commission's goal, it has not accounted for its finding from the record in *Chronicle Broadcasting Co.*, 40 F.C.C.2d 775, 782 (1973) that 10% of the population of the San Francisco metropolitan market, or over 400,000 people, receive their news exclusively from the now grandfathered *Chronicle* outlets.

The approach is quite clearly irrational. Reason would dictate that in setting a per se standard for divestiture by "effective monopolies," the Commission might resort to a Sherman Act or other antitrust-type standard.[62] Further, in setting a standard for

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[61]The Commission has recently ruled that all grandfathered licensees will have the benefits of tax deferral when they do divest, even 20 years from now, by declaring that its tax certificate policy will no longer require a causal connection (such as a three-year time period) between the adoption of the Commission's new ownership policy and the sale or exchange "appropriate" to effectuate such a rule change. *Tax Certification Policy*, 59 F.C.C.2d 91 (1976), *petition for reconsideration pending*.

[62]Under the Sherman Act, 75% concentration has been held to be prima facie monopoly, *United States v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The Commission, however, has grandfathered many licensees who control such an extensive share of the market. The Commission sought to restrict "monopolies," but did not take into account what constituted a monopoly under the antitrust laws. Ironically, it did apply a strict antitrust standard where it should have used a diversity-based standard.

ad hoc challenge, the Commission would rationally continue to take a diversity-based approach towards concentration, allowing parties to plead facts which meet the underlying bases for the rules.[63] Regardless of what the numbers may be,[64] a reasonable rule short of across-the-board divestiture would have to be similarly designed.

B. The Ad Hoc Standard.

In describing the Commission's action with respect to existing licensees, the parties speak generally in terms of grandfathering those interests. The Commission, however, did not simply grandfather. Rather, it entrenched those licensees into their concentrated positions by adopting a stricter, near impossible standard for ad hoc challenges to those licenses based on undue concentration of control grounds. *NCCB*, 555 F.2d at 968-69 (A. 440) ("challenges to renewal of . . . [grandfathered] stations' licenses would have to meet tougher threshold requirements.")

In a brief passage in the *Second Report*, the Commission held that

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[63]The multiple ownership rules, at one point, provide that a license shall be granted if it would result in a concentration of control of broadcasting contrary to the public interest. Although the rule goes to the national limit of stations, the Commission's "considerations . . . to the facts of each case" are instructive here. They include "the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question." 47 C.F.R. §§73.35(b), 73.240(a)(2), 73.636(a)(2)(1976) (A. 243-44, 250-51, 257-58).

[64]NCCB suggested that 30% concentration warrant per se divestiture, and 20%-30% prima facie concentration. (A. 840). Commissioner Robinson adopted a similar standard (A. 278), and the Court of Appeals contemplated that this kind of approach was possible on remand. (A. 393, n. 53).

> [A]bsent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that [petitions to deny renewals based on questions of undue concentrations of control] . . . would raise valid issues necessitating the designation of renewal applications for hearing.

Id., 50 F.C.C.2d at 1088, ¶ 130 (A. 218). The Commission gave no indication of its reasoning for adopting this standard, and the Court of Appeals found that the Commission "without reasoned discussion," had "abandoned its former policy of allowing petitioners to deny the opportunity to demonstrate in any one of several ways that cross-ownership harms the public interest." *NCCB*, 555 F.2d at 966, n. 108 (A. 428).[65] The Court pointed out that "[t]he Commission's decision to substitute an antitrust standard for this open-ended test is inconsistent with the Order's emphasis on First Amendment considerations," and that this "unreasonably curtails the interests of petitioners to deny." *Id.*

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[65]The Commission's previous policy was to consider charges of undue concentration of control in various manners. *See* 47 C.F.R. §§73.35(b), 73.240(a)(2), 73.636(a)(2)(1970). In the renewal context the Commission had designated separate hearing issues on undue structural concentration, absent abuses or monopolization in, for example, *Frontier Broadcasting Co., supra*, n. 13 (Cheyenne, Wyoming); *Midwest Radio-Television, Inc.*, 16 F.C.C.2d 943, 18 F.C.C.2d 1011 (1969), *later deferred to Docket 18110*, 24 F.C.C.2d 625, 626-28 (1970) (Minneapolis-St. Paul); *Chronicle Broadcasting Co.*, 16 F.C.C.2d 882 (1969) (San Francisco) *later deferred to Docket 18110*, 40 F.C.C.2d 775, 796 (1973). In other contexts the Commission also found undue structural concentration to raise public interest questions. *E.g.*, Transfers: *Jonquil Broadcasting Co.*, 21 F.C.C. 2d 178 (1970); *Gale Broadcasting Co.*, 15 P.&F. Radio Reg. 2d 337 (1969); *Miami Broadcasting Co.*, 1 P.&F. Radio Reg. 2d 43 (1963); Initial applications: *Lee Enterprises, Inc.*, 18 F.C.C.2d 684 (1969); *American Television Co.*, 12 F.C.C.2d 518 (1968).

(A. 429). The Court noted, in passing on the reasonableness of the Commission's action, that the Commission had based its grandfather rule on the fact that the record did not contain evidence documenting the harmful nature of cross-ownership. If the grandfather policy had been supportable at all, the Court observed, the Commission should have encouraged "showings of harm in individual markets rather than effectively to prohibit it." *Id.* (A. 428-29).

Moreover, the Court found that the right granted by the Commission was as a practical matter a right foreclosed. In the first case where such issues were presented, the Commission backed away from its new standards, claiming it had neither the "expertise" nor "experience" to enforce antitrust laws and, moreover, that it believed to do so would be "inappropriate." *WGAL-Television, Inc., supra,* n. 17, 62 F.C.C.2d at 531 (1976). Quite clearly, the Commission, in adopting its "grandfather rule" has made it impossible for "safety valve" procedures to be employed in determining whether the purposes of the rule would better be served by its non-application. See *United States v. Storer Broadcasting Corp., supra.*[66]

Additionally, the Commission's ad hoc Sherman Act standard does not fully relate to the underlying purposes

[66]As Judge Leventhal observed in *WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969):

> The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure. . . . That an agency may discharge its responsibilities by promulgating rules of general application . . . does not relieve it of its obligation to seek out the "public interest" in particular individualized cases.

of the rules. It neither takes the goal of diversity into account,[67] nor does it sufficiently allow for full exploration of the competitive aspect of the rule, short of "economic monopolization."[68] Thus, the Commission does not consider extreme concentration, short of an intent to monopolize,[69] and it appears from subsequent cases to be unable even to apply its own standard.

The seriousness of the Commission's lack of reasonable standards is best demonstrated by the facts presented in the *WGAL* case, where the Commission refused to examine the competitive issues, *WGAL-Television, Inc.,* 62 F.C.C.2d 527 (1976). In that case, petitioners alleged that one family had owned a monopoly in Lancaster, Pennsylvania, of the daily and Sunday newspapers, the only VHF station in the region, two radio stations, and the city's only cable system. They estimated that this family controlled 89% of local advertising revenues and, among other things, that the daily newspaper carried only television listings of its own station. The licensee had been grandfathered be-

[67]Thus, in *McPherson Broadcasting, Inc.,* 54 F.C.C.2d 565, 566 (1975), where the licensee was the owner of the only newspaper and only radio stations assigned to McPherson, Kansas, but the city received signals from neighboring Salina, the Commission refused to consider evidence of 22.4% verbatim overlap of local news stories between the commonly owned newspaper and radio station, stating, "Here petitioners have failed to allege specific facts which might warrant action under the antitrust laws of the United States." *Id.*

[68]*See, e.g., Newhouse Broadcasting Corp., supra,* n. 32.

[69]The Commission has stated that if a grandfathered licensee later meets the standard for divestiture—that is, where the only competing signal has been withdrawn from the market for some reason—it will not later require divestiture. *Reconsideration, supra,* 53 F.C.C.2d at 590-91 (A. 320).

cause a UHF station, assigned to Lebanon-Lancaster, technically placed a city-grade signal over the city, although petitioners submitted affidavits from local residents that they could not receive an adequate signal without subscribing to the licensee's cable system, and over 15,000 residents did not have UHF receivers.

Although the Commission did designate WGAL's application for hearing, it narrowly limited the issue to a determination of facts and circumstances surrounding three specific abuses, *id.*, 62 F.C.C.2d at 535, declining to look into "economic monopolization," *id.*, 62 F.C.C.2d at 532, n. 11. The Commission stated:

> The Commission has neither the expertise nor the statutory authority to enforce the antitrust laws in its regulation of the broadcast industry. In our view, enforcement of the Sherman Act and similar statutes rests properly with other federal agencies entrusted with the expertise and jurisdiction over these matters. *Id.*, 62 F.C.C.2d at 531.

The Commission also ignored the petitioners' request for special relief from the grandfather rule, looking towards divestiture as a remedy instead of looking only to license forfeitures.[70]

The Commission's emphasis on economics in the ad hoc standard is all the more puzzling in view of its sole reliance on the diversity standard for deter-

[70]In *Frontier Broadcasting, supra,* n. 13, the Commission contemplated in a renewal proceeding that an undue concentration of control finding might warrant the remedy of divestiture. However, the Commission's ad hoc standard adopted in Docket 18110 does not contemplate divestitures as a remedy. *Cf. Effingham Broadcasting Co.,* 51 F.C.C.2d 453, 457 (1975) (ad hoc standard, if met, would have merited renewal hearing for licensee already required to divest).

mining which licensees would be required to divest. There, the Commission rejected an antitrust approach, stating that its concern was "diversity in ownership as a means of enhancing diversity in programming service to the public." *Second Report,* 50 F.C.C.2d at 1079, ¶ 110 (A. 199).

IV.

A REVIEWING COURT MAY INSTRUCT AN AGENCY ON REMAND WHERE FAIRNESS AND THE PUBLIC INTEREST SO DICTATE.

This Court has previously struck down arbitrary grandfather clauses.[71] *A fortiori* it should affirm

[71]Grandfathering began as attempts by some States to disenfranchise black voters by imposing a strict literacy requirement to vote, exempting all those whose relatives voted prior to 1866. They were found contrary to the Fifteenth Amendment. *Guinn v. United States,* 238 U.S. 347 (1914). Claiming a state interest in having a well-informed electorate, Oklahoma had exempted most of the population from its literacy test in order to favor white voters.

Similarly, claiming the need to promote the public's First Amendment interest in diverse information sources, and to protect the public from concentrations of control over the media, the Commission has arbitrarily exempted many of the nation's large population centers from the benefits of that policy, instead designing a rule to favor the established interests.

Nor may the Commission be presumed in good faith here. As the Court of Appeals once warned, "Our experience with the problem of grandfathering in the communications industry has been such that I am unwilling to accept blithely the Commission's assurances of good intentions." *Pikes Peak Broadcasting v. FCC,* 422 F.2d 671, 685 (D.C. Cir. 1969) (Bazelon, C.J., *concurring*).

The Court in *United States v. Maher,* 307 U.S. 148 (1939), cited by petitioners (FCC Br. at 29; NAB Br. at 44, 46; Channel Two Br. at 42) simply reviewed whether the Interstate Commerce Commission properly found that the petitioner did not fall within the grandfather clause of the Motor Carrier Act. It did not prohibit a court from overturning an irrational grandfather clause.

(This footnote is continued on next page)

the lower court's reversal of an arbitrary system which not only grandfathers, but irrationally shields concentrated licensees from equitable enforcement of the public interest standard of the Communications Act.

The petitioners argue that the Commission, like other agencies, should be allowed discretion to determine whether or not to apply a new rule to existing licensees. But this begs the question. The Commission decided to require some licensees to divest; the Commission's authority to impose divestiture requirements is by now beyond question;[72] and the issue then becomes simply whether the grandfather exception which swallowed the rule is arbitrary and capricious.

Even if divestiture were regarded as retroactive, despite the three-year license limitation contained in the Communications Act,[73] the NAB can hardly complain of a Court of Appeals reversal of the FCC's failure to apply a rule or decision retroactively. In *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976), the Court required the Commission to apply *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), retroactively, and refund excess fees collected under an improper fee schedule.

New Orleans v. Dukes, 427 U.S. 297 (1974), affirming a grandfather clause over a Fourteenth Amendment equal protection challenge, looked to whether the remedy in question was reasonably related to the goal of the ordinance. Here the Court of Appeals correctly found that the Commission had no record support or rational basis for the distinctions in its remedies. As we have shown, the grandfathering is not reasonably related to the goals of the rule.

[72] *General Telephone Co. of the Southwest v. FCC, supra*, n. 4; *Metropolitan Television Corp. v. FCC, supra*, n. 10.

[73] 47 U.S.C. §§301, 304, 307, 309(h) (1970). The First Circuit has held that application of new environmental standards to a parking lot already under construction is not retroactive rulemaking. *South Terminal Corp. v. EPA, supra*, n. 55.

As Judge McKinnon wrote in *NAB*, "The general rule of long-standing is that judicial precedents normally have retroactive as well as prospective effect." *Id.*, 554 F.2d at 1130. The *NAB* Court later expands, quoting from *B. J. MOORE, FEDERAL PRACTICE* at 0.402 [3.-2-2] (1974), that "consistency in the administration of justice is a desirable goal, to be pursued in the absence of compelling circumstances justifying another result." *Id.* at 1131. The *NAB* Court went on to apply this reasoning to the FCC's fee schedule rules. In analyzing the normal bases for applying a decision prospectively only, the Court considered the factors of "(1) the extent of justifiable reliance upon the rejected precedent or rule; (2) the purpose of the newly announced rule; (3) the degree of finality . . . and (4) the element of surprise." *Id.*, 554 F.2d at 1132.

Here, the purpose of the newly announced rule is to promote diversity throughout the country. It should apply to those concentrations of control in existence now as well as those in the future. Further, newspaper owners cannot now claim surprise at the implementation by rule of a policy which has been applied on an ad hoc basis for decades, nor can they claim that "justifiable reliance" or "degree of finality" is properly weighed on the side of entities which are entitled to no more than a three-year license. Simply, the *NAB* case is analogous to the instant one, and supports the Court's decision below.

Similarly, this Court in *Addison v. Holly Hill Co.*, 322 U.S. 607 (1944) ordered an administrator of the Fair Labor Standards Act to prepare a new regulation to be applied retroactively. Justice Frankfurter stated, for the Court,

> [A]gainst retroactivity we balanced the considerations that made retroactivity the lesser evil.
>
> In short, the judicial process is not without the resources of flexibility in shaping its remedies, though courts from time to time fail to avail themselves of them. The interplay between law and equity . . . has properly been drawn upon in working out accommodating relationships between the judiciary and administrative agencies. And certainly in specific cases . . . it is consonant with judicial administration and fairness not to be balked by the undesirability of retroactive action. . . .

Id., 322 U.S. at 622. See also *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (upholding retroactive agency rule). *Cf. Williams v. Washington Metropolitan Area Transit Commission*, 415 F.2d 922, 943 (D.C. Cir. 1968) (en banc), *cert. denied*, 393 U.S. 1081 (1969) (Court ordered refund of transit fares collected under invalid fare structure).

There are other examples of strong judicial orders where the agency loses sight of its purpose. In *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969), for example, the Court of Appeals found a renewal hearing beyond repair and itself lifted the license, allowing the renewal applicant to reapply on an equal footing with competitors. The point in that case, *NAB*, *Addison*, and *Chenery* is that the public interest prevails. And here the Commission simply lost sight of the public when looking at the powerful licensees it must regulate.[74]

[74]As Judge Friendly has characterized the propriety of orders such as the one here under review, "There are those cases where, although the Court speaks of inadequate findings, the real trouble is that the agency has misconstrued the statute. Here there must be reversal and usually a direction rather than a discretionary remand." H. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 *DUKE L.J.* 199, 223 (1969).

While the Court of Appeals had the authority to require the Commission to adopt an equitable rule, the Court did not go so far as the petitioners, in their zeal for reversal, indicate. The Court of Appeals simply ordered the agency to act rationally and consistently with its authorizing statute, and its own policies. It therefore did not, as petitioners argue (*e.g.*, FCC Br. at 37; Dispatch Printing Co. Br. at 19), usurp the role of weighing competing factors. Instead, it required the Commission to act reasonably in applying its own standards, and to explain its departure from prior norms in the relative weights accorded diversity and the other lesser factors the Commission considered. *See Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954).

Finally, the Court of Appeals left the Commission with discretion as to the particular form any rule on remand would take.[75]

CONCLUSION.

The paramount principles involved in this case, NCCB suggests, were summed up almost ten years ago when the Court of Appeals stated in *Joseph v. FCC*, 404 F.2d 207, 211-12 (D.C. Cir. 1968):

> The public welfare requires the Commission to provide the "widest possible dissemination of infor-

[75]This is evidenced by the Court's recognition at n. 53 (A. 393) that the Commission might "adopt on remand a policy of requiring divestiture where combinations have over 30% of the market. . . ." This is hardly a statement which could be made by a court ordering divestiture of *all* co-located combinations.

mation from diverse and antagonistic sources" and to guard against undue concentration of control of communications power.

* * *

[A]n agency may change its standards prospectively, though that power is not in derogation of the duty to change them retrospectively when that better furthers the overall public interest.

For the foregoing reasons, Respondent NCCB respectfully requests this Court to reinstate the decision of the Court of Appeals and to affirm its judgment.

Respectfully submitted,

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Counsel wish to acknowledge the research work of UCLA law students Ms. Fern Kaplan and Ms. Linda J. Lacey.

APPENDIX.

26 U.S.C. § 1071(a) (1970):

§ 1071. Gain from sale or exchange to effectuate policies of F.C.C.

(a) *Nonrecognition of gain or loss.*—If the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio broadcasting stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of section 1033. For purposes of such section as made applicable by the provisions of this section, stock of a corporation operating a radio broadcasting station, whether or not representing control of such corporation, shall be treated as property similar or related in service or use to the property so converted. The part of the gain, if any, on such sale or exchange to which section 1033 is not applied shall nevertheless not be recognized, if the taxpayer so elects, to the extent that it is applied to reduce the basis for determining gain or loss on sale or exchange of property, of a character subject to the allowance for depreciation under section 167, remaining in the hands of the taxpayer immediately after the sale or exchange, or acquired in the same taxable year. The manner and amount of such reduction shall be determined under regulations prescribed by the Secretary or his delegate. Any election made by the taxpayer under this section shall be made by a statement to that effect in his return for the taxable year in which the sale or exchange takes place, and such election shall be binding for the taxable year and all subsequent taxable years.